PERWIRA AFFIN BANK BHD

v.

PAN SILVER CORPORATION SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[COMPANY WINDING-UP NO: 28-26-99]
9 MARCH 2000

COMPANY LAW: *Winding-up - Petition - Petition against guarantor company - Grounds - Non-compliance with statutory demand for payment of judgment debt - Whether petitioner could proceed against guarantor company to recover debt - Whether non-compliance with statutory demand a mere omission - Whether presumption of insolvency rebutted - Whether subsidiaries companies affected - Whether presentation of petition an attempt to put undue pressure on guarantor company - Whether just and equitable that guarantor company be wound up*

The petitioner applied to wind up the respondent ('the company') on grounds that the company was unable to pay its debts as it had not complied with a statutory demand requiring payment of a judgment debt. The company asserted that it was not just and equitable that it be wound up because: (i) the company genuinely believed that the assets of the principal debtor were sufficient to settle the judgment debt and as such there had been no neglect on the part of the company to comply with the statutory demand; (ii) a winding-up would jeopardise the three subsidiaries of the company who were doing well; and (iii) the presenting of the petition was an attempt to exert undue pressure on the company who was only a guarantor while the principal debtor had yet to be wound up.

Held:

[1] A creditor in the position of the petitioner who has taken security from a guarantor as well as a principal debtor is at full liberty to proceed simultaneously against the principal debtor as well as a guarantor to recover a debt.

[2] The failure of the company to comply with the statutory demand could not be described as a mere omission. The failure was deliberate and devoid of any reasonable excuse. The belief held by the company that the assets of the principal debtor were sufficient to fully settle the debt could not have been genuinely held as now claimed. Accordingly, there was neglect on the part of the company to comply with the s. 218(2)(a) notice. Thus, a presumption of insolvency has arisen against the company.

[2a] There was no evidence led by the company to rebut the presumption of insolvency. The company had not attempted to show that it was not insolvent and that it was able to pay its debts. Also, the company had not exhibited its audited accounts to show what its financial position was and what assets it owned.

[3] The company had not indicated or shown in what manner the fact that the subsidiary companies were doing well would discharge the presumption of insolvency against the company. Also, no reliance or weight could be placed on the evidence produced to support the company's submission that those subsidiaries were doing well.

[4] The company's allegation that the petition was presented to put undue pressure on the company was a bare allegation which could not be acted upon by the court.

[5] It was just and equitable that the petitioner should obtain the order it sought against the company. Accordingly, the company should be wound up.

[Petition allowed.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1986] MLJ 16 ***(refd)***
Chew Siew Lei v. Jet Age Construction Sdn Bhd [1994] 3 CLJ 47 ***(refd)***
Public Bank Bhd v. CP Ng Holdings Sdn Bhd [1997] 2 CLJ Supp 459 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1988] 1 MLJ 84 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 MLJ 313 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)
Rules of the High Court 1980, O. 83

For the petitioner - Cheng Chee Hee; M/s Tay, Ibrahim & Partners
For the respondent - M Mathialagan; M/s Madhi Param & Co
For the official receiver - D Gunasegran, Pejabat Pemegang Harta Perak

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner JC:

This is a petition to wind-up the respondent (hereafter the company) based on s. 218(1)(e) and s. 218(2)(a) of the Companies Act 1965, (hereafter the Act) on grounds that it is unable to pay its debts as it had not complied with a statutory demand requiring payment of a judgment debt, served on it on 13 March 1999. The petitioner accordingly asserts that it is just and equitable that the company be wound-up.

The company was incorporated in Malaysia on 14 March 1975 under the Act and has its registered address at No. 88A Jalan Sultan Idris Shah, 30000 Ipoh, Perak Darul Ridzuan. The nominal share capital of the company is RM10 million divided into 10 million shares of RM1 each. The amount of the capital paid up or credited as paid-up is RM4.75 million. The objects for which the company was established are to carry on all kinds of mining and exploration business, farming (including agriculture), and mine and estate management.

The petitioner granted banking facilities to a company called Pan Silver Printers Sdn Bhd (hereafter the principal debtor). As security, the petitioner took a debenture over the assets of the principal debtor, which assets included a parcel of land held under PT. No. 2731 Mukim of Ulu Kinta (hereafter the said land) on which is constructed a factory housing a printing press and machinery. The petitioner also took a guarantee from the company.

When the principal debtor defaulted in the terms of its banking facilities, the petitioner took steps to enforce the guarantee against the company. Proceedings were commenced at the High Court in Ipoh and on 15 April 1998, the petitioner obtained judgment against the company for the sum of RM1,276,821.18 as at 10 June 1997 together with interest thereon at 4% above base lending rate of 9.55% per annum from 11 June 1997 to date of satisfaction being the amount due on an overdraft account; and RM2,240,000 being the principal sum due on a loan account.

The petitioner thereafter caused its solicitors to serve on the company two demands for payment of the sums due on the abovementioned judgment but when there was no response from the company, the petitioner's solicitors served on the company a statutory notice pursuant to s. 218(2)(a) of the Act requiring payment of the sums due under the judgment. A first notice was sent to the company at their registered office at No. 5A, Regat Dato Mahmood, 31650, Perak, on 26 February 1999 but on being informed that the company's registered office had been changed, the petitioner's solicitors caused another s. 218(2)(a) notice to be served on the company at their new registered address on 13 March 1999. The company has not responded to that notice. Accordingly, on 21 April 1999, this petition was presented.

The petitioner has also taken steps to enforce its rights under the debenture executed by the principal debtor.

A receiver and manager was appointed over the assets of the principal debtor comprised in the debenture but the receivers and managers so appointed have ceased to act since 1 September 1999. The petitioner has also obtained an order for sale of the said land pursuant to O. 83 Rules of the High Court.

On the hearing of this petition, no interested parties appeared to oppose or to support the same. Only the company opposed the petition. The company asserts that it is not just and equitable that it should be wound-up for four reasons:

(a) the company genuinely believed that the assets of the principal debtor were sufficient to settle the judgment debt. As the basis for its genuine belief, the company relies upon a valuation report undertaken on the said land and printing press undertaken in 1996 when the principal debtor was applying for the banking facilities from the petitioner. That report puts the open market value of the said land and equipment at RM4.9 million and the forced sale value at RM3.8 million. Since the petitioner had obtained an order from the court to auction off the said land, the company believed that if the sale was successful there would be no debt owing from the principal debtor as the judgment debt amounted to RM3.5 million;

(b) since the company genuinely believed the debt would be paid, it cannot be said that there had been neglect on the part of the company to comply with the s. 218(2)(a) notice; at best the company had omitted to meet the demand, but it had reasonable cause to do so. In support the case of *Public Bank Bhd v. CP Ng Holdings Sdn Bhd* [1997] 2 CLJ Supp 459 was cited;

(c) the company and its three subsidiaries are actively trading. The three subsidiaries were identified as Melati Marketing and Trading Sdn Bhd (hereafter Melati) which is a 100% owned subsidiary. Melati had on 3 May 1999 secured a tender from Dewan Bahawa dan Pustaka to supply RM1.2 million worth of stationery to the Dewan. Another 100% owned subsidiary was identified as Faza Holidays Sdn Bhd. A third subsidiary was identified as Pan Silver Ferry Sdn Bhd (hereafter Pan Silver Ferry) whose audited accounts showed that it was making profit, having earned RM279,905 for the year ended December 1998.

It was submitted that in the present state of the economy, a winding-up would jeopordise the three subsidiaries. In support the case of *Chew Siew Lei v. Jet Age Construction Sdn Bhd* [1994] 3 CLJ 47 was cited;

(d) the presenting of this petition represented an attempt to exert undue pressure on the company, who is only a guarantor, while the principal debtor had yet to be wound-up.

From the submissions before me, several things are clear: the company does not dispute the debt, does not question the position of the petitioner as a creditor or of its entitlement to present this petition. The company has confined itself to showing why it would not be just and equitable to order its winding-up.

The law on the matter now before the court for adjudication is quite clear. The consequence in law of a company neglecting to comply with a statutory notice served on it pursuant to s. 218(2)(a) of the Act requiring it to pay the debt specified in the notice, is that a presumption arises that the company is insolvent and unable to pay its debts. In *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 MLJ 313, Gunn Chit Tuan SCJ (as he then was) speaking for the Supreme Court said at p. 320:

> ... the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove it is able to pay its debts.

There has been absolutely no challenge from the company that the provisions of s. 218(2)(a) of the Act have not been complied with. However, counsel for the company submitted that as the company genuinely believed that the sale of the said land and machineries would fully settle the debt, the company was not guilty of neglect to comply with the s. 218(2)(a) notice. At best there was a mere omission, and, there was reasonable cause for that omission as they relied upon the valuation report of 1996 to found their belief. In these circumstances, submitted counsel, no presumption of insolvency can arise against the company. In support of his submissions counsel for the company relied upon the following passage of the judgment of RK Nathan JC (as he then was) in the case of *Public Bank Berhad v. CP Ng Holdings Sdn Bhd (supra)* where the learned judge in considering the word "neglect" in the context of a s. 218(2)(a) notice said:

> In *Re London and Paris Banking Corporation* [1874] 19 LR 444, it was held that the omission of a Joint stock company to comply with a statutory notice requiring payment of a debt served by a creditor on the company under the Companies Act 1862 s. 80(1) is not "neglect" within the meaning of that sub-section, unless there is no reasonable cause for that omission and with regard to the word "neglect" referred to in the sub-section, Sir G. Jessel MR said at p. 446:
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> > It is very obvious on reading that enactment that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand as I understand it is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence.

The submission of counsel for the company gives rise to the following questions: did the company have a reasonable excuse for not complying with the statutory notice requiring payment? I find it did not and say so for reasons that follow. Firstly, there is nothing before me to suggest that within the 21 days after the demand was made or even before that date, the company had indicated to the petitioner that they were not going to comply with the notice or pay the debt because they believed the sale of the said land and

machines would fully settle the debt. In fact the evidence shows that after judgment was entered against the company, and before this petition was presented, the petitioner had twice through its solicitors on 13 February 1999 and 16 June 1999 demanded payment of the judgment debt. There was no indication then that the company held such a belief.

Secondly, the valuation report of 1996 puts the open market value of land, buildings and machinery at RM4.9 million. Of this sum, land and buildings was assigned a value of RM1.7 million and plant and machineries at RM3 million. However, Ahmad Morad, the deponent of the company's affidavits sworn in opposition in these proceedings, knew from as early as 24 November 1998 that the plant and the machineries were to be sold by the receiver and manager for only RM360,000. This is evident from the fact that on 28 November 1998 Ahmad Morad wrote a letter to the receiver and manager complaining of that price and asking him not to proceed with the sale. Thus, well before the statutory notice was served on the company on 13 March 1999, the company already knew that the items which had been assigned the highest value in the 1996 valuation report would not fetch that price.

Thirdly, it is obvious that the company regarded their obligation to comply with the statutory notice as only arising after the petitioner had exhausted all its remedies against the principal debtor. This is what Abdul Morad stated in para. 5 of his affidavit affirmed on 17 June 1999 (encl. 9).

> I say that the petitioners has not exhausted all actions against the principal debtor M/s Pan Silver Printers Sdn. Bhd. to realise the debt before taking this drastic action against the respondent.

If anything, this statement lays bare the true reason for the company not complying with the statutory notice. This was an erroneous stand taken by the company because a creditor, in the position of the petitioner, who has taken security from a guarantor as well as a principal debtor is at full liberty to proceed simultaneously against the principal debtor as well as a guarantor to recover a debt. In *Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani* [1986] MLJ 16 Lee Han Hoe CJ Borneo speaking for the Supreme Court referred to such a right at p. 17 para. E in the following words:

> The guarantor has no special right to demand that the creditor called upon the principal debtor to pay off the debt before asking the guarantor to pay.

I accordingly have no hesitation in holding that the failure of the company to comply with the statutory notice cannot be described as a mere omission. The failure was deliberate and devoid of any reasonable excuse. The belief held by the company that the assets of the principal debtor were sufficient to fully settle the debt could not have been genuinely held as now claimed. There had accordingly been neglect on the part of the company to comply with the

s. 218(2)(a) notice served on it by reason whereof a presumption of insolvency has arisen against the company. In *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1988] 1 MLJ 84, VC George J (as he then was) described the presumption of insolvency as a rebuttable one. I have anxiously looked for evidence that would enable the company to rebut the presumption but regret to say that the company has not attempted in the least to show that it is not insolvent and that it is able to pay its debts. The company has not even exhibited its audited accounts to show what its financial position is and what assets it owns.

Counsel for the company has submitted that it has three subsidiary companies that are doing well and therefore it would be unjust to both the company as well as these subsidiaries if the company were ordered to be wound-up. I regret I find no merit in this submission. Counsel has not indicated or shown in what manner the fact that these subsidiaries are doing well will discharge the presumption of insolvency that now hangs over the company. I also find that I cannot place any reliance or weight on the evidence produced to support the submission that these subsidiaries are doing well. Melati may have been awarded a tender for RM1.2 million by the Dewan Bahasa Dan Pustaka but the company has not revealed what Melati's financial position and liabilities are. It would have been easy to produce the audited accounts of Melati to demonstrate its worth and earnings but this was not done. Similarly, in respect of Faza Holidays, no information at all was disclosed in the affidavits about the financial standing of this company. With regard to Pan Silver Ferry, while their audited accounts for 1998 has been exhibited, a perusal of those accounts does not show that the company is a shareholder in Pan Silver Ferry. No other evidence was tendered to show that the company is a shareholder in Pan Silver Ferry. There is accordingly no basis for claiming that Pan Silver Ferry is a subsidiary of the company.

Lastly, with regard to the submission that this petition has been presented to put undue pressure on the company, counsel has not identified what this undue pressure or oppression or unfairness consists of so that I may properly consider whether or not the allegation merits consideration. In the circumstances I must regard the assertion as a bare allegation which cannot be acted on by the court.

In the result, I find the company has failed to discharge the presumption that it is commercially insolvent. Being unable to pay its debts, there is only one way that the discretion vested in the court can be exercised. It is just and equitable that the petitioner should obtain the order it seeks against the company. I accordingly order that the company be wound-up. The official receiver is appointed provisional liquidator of the company.